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No. 94-1777

In the Supreme Court of the United States October Term, 1994

WILLIAM L. BALL; ROGER MANNHALTER; JOHN J. HOWE, JR.,
Petitioners,

v.

JOHN R. GASHO, SR.; SHARON L. GASHO,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Consistent with this Court's decisions in *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), and *Anderson v. Creighton*, 483 U.S. 635 (1987), the Ninth Circuit determined that the Customs Agents were not entitled to qualified immunity because, based on clearly established law, no reasonable Customs agent could have believed that there was probable cause to arrest John and Sharon Gasho. Thus, this case presents the following questions:

1. Whether Petitioners' argument that the Ninth Circuit did not apply an objective standard of reasonableness to determine the qualified immunity issue is frivolous.

2. Whether Petitioners' argument that the Ninth Circuit did not apply clearly established principles of constitutional law to defeat Petitioners' qualified immunity defense is frivolous.

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TO THE HONORABLE SUPREME COURT:

Respondents John R. Gasho, Sr. and Sharon L. Gasho respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners William L. Ball, Roger Mannhalter, and John J. Howe, Jr.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, Respondents refer this Court to the statutory provisions cited below.

Title 18, Section 2233, of the United States Code provides:

> Rescue of seized property.
>
> Whoever forcibly rescues, dispossesses, or attempts to rescue or dispossess any property, articles, or objects after the same shall have been taken, detained, or seized by any officer or other person under the authority of any revenue law of the United States, or by any person authorized to make searches and seizures, shall be fined under this title or imprisoned not more than two years, or both.

Title 28, Section 2676, of the United States Code provides:

> Judgment as bar.
>
> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

STATEMENT OF THE CASE

A. Factual Statement.

John and Sharon Gasho own an aircraft restoration company in Tucson, Arizona. On June 24, 1988, the Gashos flew a McDonnell Douglas DC-3 aircraft from Tucson to the Scottsdale Municipal Airport in order to meet with John Zarcone, a Federal Aviation Administration (FAA) inspector.[1] The Gashos were selling the aircraft to Millardair, Ltd., a Canadian corporation, and needed to terminate the United States registration of the aircraft before export.

At the airport, Zarcone issued the Gashos several documents, including a Special Flight Authorization allowing the aircraft to be flown to the United States-Canada border with Canadian registry markings. The Special Flight Authorization stated that Canada would not issue a valid Canadian registration until the aircraft actually entered into Canada. Millardair had applied to Canadian authorities for a Canadian registration and had been assigned a Canadian number; however, official registration was contingent upon the aircraft's entry into Canada.

The Gashos with the assistance of Zarcone removed the U.S. registration markings and affixed the Canadian

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[1] There is absolutely no evidence that John and Sharon Gasho have ever participated in smuggling contraband across the United States-Mexico border. In fact, the Customs Service concluded after their investigation of the Gashos that they are honest, law abiding citizens who are "as clean as a whistle."

markings to the aircraft. The Gashos then returned to their room at a nearby hotel in Scottsdale, Arizona. It was the Gashos' intention to return to Tucson the following day to await issuance of a provisional certificate of registration and flight permit before exporting the aircraft to Canada.

Later that day, an air traffic controller at the airport noticed that the registration markings on the aircraft had been changed after its arrival. He alerted William Gately, the Customs agent in charge. Based solely on the report of the air traffic controller and without any further investigation, Gately, Special Agent William Ball and others decided that "the aircraft would not be permitted to depart, and should be seized because of registration irregularities."[2] Gately dispatched Special Agents Ball and Roger Mannhalter to investigate.

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[2] Gately claims that he telephoned a friend, Corporal Karol Waversfeld of the Royal Canadian Mounted Police in Vancouver. Gately claims Waversfeld told him the registration markings were invalid prior to seizure of the aircraft. Waversfeld gave a different account in a deposition. He testified that Lorraine Gray of the Canadian Transport Ministry in Toronto told him that an application for Canadian registry was pending and that the numbers could not be used in Canada until the application was approved. Waversfeld testified that he relayed this information to Gately or his representative. There is also a dispute regarding when the information was relayed to Gately. Petitioners claim that Gately knew the information before the seizure of the aircraft. Waversfeld, however, testified that he could not have called Gray on the afternoon of June 24, 1988, because there is a four hour time difference between Vancouver and Toronto and therefore Gray would not have been at her office when Waversfeld received the call from Gately in the afternoon of June 24, 1988.

The Customs Agents learned from officials at the Scottsdale Airport that the Gashos were staying at a local hotel. The Customs Agents easily located the Gashos at the hotel. When the Agents confronted the Gashos at their hotel room, John Gasho explained the ownership history of the aircraft, that he obtained the Canadian registry markings from the aircraft's owner, Millardair, and that the FAA inspector John Zarcone had assisted in changing the registration markings. He explained that the FAA issued several documents, including a special authorization permit, which was inside the aircraft, allowing the aircraft to be flown to Canada. After hearing John Gasho's explanation, Customs Service Pilot Will Willbanks, who was also present at the hotel, informed Agents Ball and Mannhalter that the procedure described by John Gasho for changing registration markings before export was consistent with the customary FAA procedures for exporting an aircraft to Canada. Nevertheless, Agent Ball advised John Gasho of his *Miranda* rights. The Gashos then summoned their daughter, Pamela Vining, a Phoenix attorney, for legal counsel.

At this point, the Agents, the Gashos and Vining went to Scottsdale airfield. At the airport, the Gashos showed the Customs Agents the documents issued by the FAA, including the Special Flight Authorization allowing them to fly the aircraft with Canadian markings. The Special Flight Authorization signed by Zarcone expressly provided that the aircraft could display the foreign (Canadian) registration markings for the purpose of flying the plane to the Canadian border and that "the aircraft . . . had a current and valid standard airworthiness certificate . . . but will not be issued a current

and valid Canadian airworthiness certificate until after its entry into Canada."

While the documentation expressly provided that the aircraft was authorized by the FAA to fly with the Canadian markings within the United States, the Agents decided that the documents did not establish the *validity* of the Canadian markings. The Agents placed a lock on the aircraft's propeller, claiming they had probable cause to seize the aircraft for the "knowing[ ] and willful[ ]" display of "false or misleading" markings, in violation of 49 U.S.C. § 1472.

After seizing the aircraft, the Customs Agents gave Sharon Gasho permission to enter the aircraft to remove personal belongings and the aircraft's radio. The Customs Agents did not tell her that any items inside the aircraft were seized. Among the items she removed were the aircraft's logbooks. Sharon Gasho then exited the aircraft, carrying the items in a plastic bag. At that time, John Gasho and the Customs Agents were standing on the tarmac near the aircraft. In the presence of the Customs Agents, John Gasho called out to his wife in a loud, clear voice and asked her whether she removed the logbooks. She replied, "Yes, I did." Sharon Gasho then placed the plastic grocery bag containing the logbooks and other personal belongings into Vining's automobile. Neither Agent Ball nor Agent Mannhalter made any effort, either physical or verbal, to stop Sharon Gasho from removing the logbooks and placing them in the vehicle. In a deposition, Agent Ball was cross-examined as follows:

Q. Did you stop her at that time?

A. No.

Q. Did you say anything to her at that time?

A. No.

Q. Did you protest in any way?

A. No.

Q. All right. What happened next?

A. Shortly thereafter we went inside the aviation center.

The subject of the logbooks was not raised until after the parties entered the Scottsdale Aviation Center to make photocopies of the FAA documents. Ball and the other Agents then told the Gashos that the seizure of the aircraft included the logbooks and demanded that the Gashos return them.[3] When Agent Ball threatened to search the vehicle, the Gashos called the local police to prevent a breach of the peace. The Agents warned the Gashos that they would be arrested if they refused to turn over the logbooks.

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[3]Customs Service Pilot Willbanks, who was present during the entire play of events at the Scottsdale Airport on June 24, 1988, told Agent Mannhalter, prior to the handcuffing of the Gashos, that the logbooks were not a "big issue." In fact, according to Customs Service policy, normally logbooks are never seized with an aircraft and are not necessary to the operation of an aircraft. Willbanks testified that the logbooks are only important when the aircraft is put in service. However, when the Customs Service seizes an aircraft, the logbooks are not important because the aircraft is not put in service, but, rather, is put in a storage facility pending forfeiture proceedings.

At Vining's request, the Agents allowed Vining to meet with the Gashos in a glass-enclosed office at the avaiation center, where the Gashos were visible to the Customs Agents. Immediately prior to the Gashos' conference with Vining, Agent Ball telephoned his supervisor John Howe to advise him of the situation. Mr. Howe ordered Agent Ball to arrest the Gashos for theft from Customs' custody and told Ball that if he did not effect the arrest, he (Howe) would come down and do it himself.

During the conference with Vining, the Gashos reached the decision to give the logbooks to the Customs Agents. Just as Vining was opening the office door to inform the Agents of this decision, the Agents pushed open the door and handcuffed the Gashos. Vining retrieved the logbooks from her car and gave them to the Customs Agents. Although the Gashos acquiesced in relinquishing the logbooks, the Customs Agents handcuffed John and Sharon Gasho, unnecessarily paraded them through the lobby of the aviation center, and loaded them into a squad car which transported them to the Madison Street jail.

The Gashos were booked for violation of 18 U.S.C. § 549, which forbids unlawful removal of property from Customs custody. During booking, an Assistant United States Attorney told Agent Mannhalter that his office would not prosecute the Gashos. Nevertheless, Agent Mannhalter's supervisor, John Howe, ordered Mannhalter to continue the booking process and to tell the Gashos that charges would be filed. In October 1989, sixteen months after the arrests, the United States Attorney formally declined to prosecute the Gashos.

B. District Court Proceedings.

The Gashos filed suit against the United States under the FTCA, 28 U.S.C. §§ 1346(b), 2671-2680, seeking damages for false arrest and false imprisonment, intentional infliction of emotional distress, and abuse of process.[4] The district court granted summary judgment in favor of the government on the false arrest and imprisonment claims and the intentional infliction of emotional distress claim. By subsequent order, the district court dismissed the abuse of process claim for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).

Prior to entry of judgment on the FTCA claims, the Gashos filed suit under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), against Agents Ball and Mannhalter, and Howe, the Agents' supervisor. The Gashos claimed that the Agents arrested them without probable cause, violating their Fourth and Fifth Amendment rights.

The defendants moved to dismiss the *Bivens* claims pursuant to Fed.R.Civ.P. 12(b)(6) and also moved for summary judgment, arguing that because of the judgment entered in the FTCA action, 28 U.S.C. § 2676 operates as a complete bar to the *Bivens* action and, alternatively, that the defendants were entitled to qualified immunity. The

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[4]The Gashos also filed a claim against Northrop Worldwide Aircraft Services, Inc. ("Northrop") for damage incurred to the aircraft while in Customs' custody. The Gashos settled the claim with Northrop.

district court dismissed the claims, concluding that they were barred by 28 U.S.C. § 2676.

C. Ninth Circuit Decision.

The Ninth Circuit consolidated the appeals in the FTCA action and the *Bivens* action. In addressing the false arrest claims in the FTCA action, the Ninth Circuit held that there was no probable cause for the arrests of the Gashos under 18 U.S.C. §§ 2232 or 2233 because no agent could have reasonably believed that the Gashos intended to steal the logbooks from Customs' custody or that the Gashos intended to prevent seizure of the logbooks.[5] *Gasho v. United States*, 39 F.3d 1420, 1427-1432 (9th Cir. 1994) (Petitioners' Brief at pp. 7a-18a). The Ninth Circuit reasoned that no probable cause existed because the Agents gave the Gashos no notice that they intended to seize the logbooks and there was no evidence that the Gashos knew the removal of the logbooks was forbidden. *Id.* The Ninth Circuit further determined that the Gashos' mere passive refusal to consent to a warrantless search did not provide probable cause to arrest the Gashos under §§ 2232 or 2233. *Id.*

With respect to the *Bivens* claims, the Ninth Circuit held that since the judgment was reversed on the false arrest claims in the FTCA action, the *Bivens* claims based on the Gashos' wrongful arrests were not barred by operation of 28 U.S.C. § 2676. *Id.* at 1437-38 (Petitioners' Brief at pp. 29a-

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[5] Although the Gashos were arrested under 18 U.S.C. § 549, the United States conceded that no probable cause for the arrests existed under § 549.

30a). Thus, the Ninth Circuit concluded that Respondents could pursue both their FTCA and *Bivens* claims on remand. *Id.*

After finding that the *Bivens* claims for wrongful arrest were not barred, the Ninth Circuit analyzed the Agents' qualified immunity claim and found that based on clearly established principles of constitutional law, no reasonable agent could have believed that the Gashos' arrests were lawful. *Id.* at 1438-39 (Petitioners' Brief at pp. 31a-32a). The Ninth Circuit employed a two-step analysis. First, the plaintiff must show that a clearly establish constitutional right exists. Second, the defendant must show that based on well settled law, he could have believed he was not violating that constitutional right. *Id.*

Under the first step of the analysis, the Ninth Circuit found that the Gashos had a clearly established constitutional right to refuse consent to a warrantless seizure. *Id.* The Ninth Circuit then found that based on an objective review of the information known to the Agents at the time of the arrests, not on their subjective motives for the arrests, no reasonable agent could have believed that the arrests were lawful. *Id.* The Ninth Circuit determined that the officers should have known the arrests were unlawful because there was no evidence the Gashos had the specific intent to prevent Customs' seizure of the logbooks or to steal them from Customs' custody. *Id.* The Agents had no facts to support a belief that the Gashos knew that the logbooks were an appurtenance to the aircraft and they should have known, in light of the clearly established law, that the Gashos' passive refusal to turn over the logbooks was privileged conduct

which could not serve as a basis for finding criminal intent. *Id.*

REASONS FOR DENYING THE WRIT

The questions of qualified immunity on which review is sought involve no conflict with any decision of the Court. Petitioners' arguments to the contrary are frivolous and imposed solely for the purpose of delaying any action on the *Bivens* claims on remand to the district court. The decision below properly applied the rulings of this Court on qualified immunity. Consistent with *Harlow v. Fitzgerald*, 475 U.S. 800 (1982), the Ninth Circuit held that no reasonable officer could have believed the arrests of the Gashos were lawful. The Ninth Circuit's decision is also consistent with this Court's ruling in *Anderson v. Creighton*, 483 U.S. 635 (1987).

I. PETITIONERS' ARGUMENT THAT THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH RULINGS OF THIS COURT IS FRIVOLOUS.

A. The Ninth Circuit Properly Applied an Objective Standard to Determine the Qualified Immunity Issue.

Petitioners contend that the Ninth Circuit improperly applied a subjective test to determine the issue of qualified immunity. In making the argument, Petitioners completely ignore the analysis of the Ninth Circuit on the qualified immunity issue. Not only did the Ninth Circuit not apply a subjective test, the court thoroughly analyzed the reasonable-

ness of the Agents' conduct objectively in light of clearly established law.[6]

In its decision, the Ninth Circuit pointed out that the Gashos presented evidence that Agent Howe told another Customs official that the Gashos were arrested because their refusal to turn over the logbooks "made [the Agents] mad." *Gasho*, 39 F.3d at 1438 (Petitioners' Brief at p. 31a). Petitioners point to this single sentence in the Ninth Circuit's opinion to support their argument that the Ninth Circuit applied a subjective test. Petitioners have taken this sentence out of context and ignore the remainder of the Ninth Circuit's opinion wherein the court thoroughly analyzed the Agents' conduct in accordance with an objective standard.

Respondents argued before the Ninth Circuit that they were arrested in retaliation for refusing to turn over the logbooks. *Id.* As evidence of the Agents' retaliation, the Gashos cited to Agent Howe's comment that the Gashos "made [the Agents] mad." *Id.* The Ninth Circuit referred to Howe's comment to explain the Gashos' argument that they were arrested solely for refusing consent to a

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[6] Petitioners erroneously argue that an officer's subjective intent is irrelevant to determining whether the officer is entitled to qualified immunity. In fact, in *Harlow*, this Court did not hold that an officer's intent is irrelevant, but rather the Court held that allegations of an officer's malice is not sufficient to subject that officer to liability unless it is shown that the officer knew or should have known that his conduct violated clearly established law. *Harlow*, 475 U.S. at 817-818. This point, however, is irrelevant because the Ninth Circuit in this case applied an objective test to determine that the agents could not have believed that the arrests of the Gashos were lawful in light of clearly established law.

warrantless search and refusing to turn over the logbooks. The Ninth Circuit did not rely on Howe's comment or the Agents' subjective retaliatory motives in concluding that the Agents were not entitled to the qualified immunity defense.

In analyzing the qualified immunity defense, the Ninth Circuit examined the facts known to the Agents at the time of the Gashos' arrests, not their subjective motives. The Ninth Circuit found that no reasonable Customs agent could have believed the arrests were lawful because there was no evidence that the Gashos had the specific intent to steal the logbooks from Customs' custody or to frustrate or prevent their seizure. *Id.* at 1438-1439. (Petitioner's Brief at pp. 31a-32a). The Agents allowed Sharon Gasho to enter the aircraft specifically for the purpose of removing objects from inside. The Agents never gave her notice that she could not take the logbooks or that the logbooks had been seized. The Ninth Circuit determined that absent such warning, the Agents had no reason to believe that the Gashos knew the logbooks were an appurtenance to the aircraft, that the logbooks had been seized or that their removal was forbidden. Further, the Ninth Circuit determined that the Gashos' mere passive refusal to consent to a warrantless search and immediately turn over the logbooks was not grounds for finding criminal intent.

The Ninth Circuit's analysis is based solely on what the Agents knew and observed prior to and at the time of the arrests and what a reasonable agent should have done under the circumstances. Nothing in their analysis suggests that the Ninth Circuit reached its conclusion that the Agents were not

entitled to a qualified immunity defense because it believed the Agents were angry with the Gashos.

B. The Ninth Circuit Clearly and Expressly Articulated the Specific Constitutional Right at Issue and Properly Held that Based on Clearly Established Law the Officers Were Not Entitled to Qualified Immunity.

There is no question that the Ninth Circuit's finding that the Agents were not entitled to qualified immunity was a decision well grounded in this Court's rulings. The Ninth Circuit recognized that Respondents had a duty to show that the constitutional right at issue was clearly established.[7] Contrary to the Petitioner's assertion, the Ninth Circuit analyzed the specific principles of constitutional rights at issue in holding that the Respondents satisfied that duty.

The Ninth Circuit first stated generally that the Fourth Amendment right to be free from arrests without probable cause is clearly established and specifically held that "it is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Gasho*, 39 F.3d at

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[7] The Petitioners attempt to confuse this issue by directing attention to whether the law was clearly established that the seizure of a vehicle did not include the contents of the vehicle. Whether the seizure includes its contents is not the issue. Under this Court's analysis in *Anderson*, the issue was whether the constitutional right asserted by the Gashos was clearly established and whether a reasonable Customs agent could have believed that Sharon Gasho knew the logbooks were seized with the aircraft.

1439 (Petitioner's Brief at p. 32a). The Ninth Circuit recognized that the heart of the issue was whether the Customs Agents should have known that probable cause was obviously lacking when the reason for the arrest was the arrestee's verbal challenge of the Agents' authority to effect a seizure or arrest.

Defendants, with an apparent recognition that their argument that the Ninth Circuit applied only general constitutional standards was contrary to the text of the opinion on its face, then argue that the Ninth Circuit, in assessing what is clearly established law relied on irrelevant and inapplicable law.

In both its discussion on probable cause and qualified immunity, the Ninth Circuit cited ample authority demonstrating that the law was well settled on this point. The Petitioners make a weak assertion that such law was not clearly established at the time of the arrest because the cases holding that passive refusal of a search or seizure is a clearly established constitutional right are not factually identical to the situation the Customs Agents were presented with. It is important to stress that the Customs Agents had *no* statutory authority for the arrests. The very wording of the statutes cited by the Petitioners as justification for the arrests precludes application of those statutes to the conduct of the Gashos. That alone gave the Agents knowledge that there was a lack of probable cause for the arrests and thus the arrests violated the constitutional rights of the Gashos.

Additionally, the passive refusal to turn over property for a warrantless seizure, had previously been held by the courts

to be an improper reason for arrest. In fact, in 1978, the Ninth Circuit held exactly that: "The passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing." *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978).

Petitioners argue that the Ninth Circuit was wrong in holding that this law was clearly established because the *Prescott* case was not factually similar enough. *Prescott* arose out of a passive refusal to allow a warrantless search at an apartment, while here the arrests occurred as a result of the passive refusal to allow a warrantless search of a car and warrantless seizure of the logbooks which were in that car. The Ninth Circuit expressly stated that while there is a lower expectation of privacy when searches involve automobiles rather than houses, "the citizen nevertheless retains the right to refuse consent to a warrantless search of the bag containing his personal effects, even if consent is given to search the vehicle." 39 F.3d at 1432 (Petitioners' Brief at pp. 17a-18a) (citing *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)). The holding in *Prescott* was squarely on point. The Petitioners here argued that the refusal to return the logbooks was evidence of Sharon Gasho's specific intent to prevent the seizure when she moved the logbooks. The defendants in *Prescott* argued that the plaintiff's passive refusal to allow entry into her apartment for a search was evidence of the plaintiff's intent to harbor a criminal. The court held in *Prescott* that such passive, privileged conduct could not be offered as evidence of intent because it would place an unfair and impermissible burden on the assertion of a constitutional right. *Prescott* 581 F.2d at 1350-51.

The Ninth Circuit's ruling that the constitutional right to passively refuse a warrantless search or seizure was well established is also based on this Court's holding in *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). *Hill's* holding was on point and constituted clearly established law upon which the customs officers should have based their actions. This Court's statement in *Hill* that "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state" should certainly serve as a guideline for law enforcement officers.

Finally, the Ninth Circuit cited *Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) as additional support of its holding[8]. *Gasho*, 39 F.3d at 1437 (Petitioners' Brief at p. 31a). The *Duran* Court followed this Court's holding in *Hill* and held that no reasonable officer could have believed there was probable cause to stop the vehicle of an individual merely because the individual had challenged his authority by verbally insulting and making obscene gestures at the officer as his car passed the officer's. The focus in *Duran* was not, as Petitioners argue, the First Amendment right to free speech, but rather was the Fourth Amendment right to be free from unreasonable search and seizure.

Petitioners argue that a reasonable law enforcement officer who was fully aware of *Hill*, *Duran* and *Prescott*

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[8]The Defendants point out that *Duran* was decided after the Gashos' arrest. *Duran*, however, did not establish new law, but merely recognized already clearly established rights.

would not know that the arrests violated the constitutional rights of the Gashos. That argument is outrageous. The holdings and pronouncements of the courts in those cases are precisely on point and leave no question that the arrest for a passive refusal to allow entry into a vehicle and/or turn over property for seizure violated a clearly established constitutional right. That Customs agents who make decisions every day regarding people's personal liberty and freedom and who are empowered to deprive a person of that liberty and freedom would not be cognizant of that law is a frightening thought for law abiding citizens such as the Gashos. If these officers were to be immune from liability for their wrongful arrests merely because a case factually identical had not yet been published, law enforcement officials would have unfettered power to act unreasonably in all but the most common scenarios.

Having held that it is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant, the Ninth Circuit turned to the second step of its inquiry. Relying on this Court's analysis in *Anderson v. Creighton*, 483 U.S. 635, 641 (1987), the Court considered whether a reasonable Customs agent could have believed that the arrests of the Gashos were lawful in light of clearly established law and the information the arresting agents possessed. 39 F.3d at 1439 (Petitioners' Brief at p. 32a). The Ninth Circuit recognized that its holding that probable cause was lacking for the arrests was not determinative because under the qualified immunity doctrine the agents would be immune if they mistakenly believed there was

probable cause to arrest the Gashos if they could have reasonably believed that their actions were lawful. *Id.*[9]

The Ninth Circuit held that the Agents failed to demonstrate that a reasonable Customs agent could have believed that the Gashos' arrests were lawful. *Id.* The Ninth Circuit carefully analyzed both grounds which the Agents cited as justification for the arrests--the removal of the logbooks and the refusal to turn the logbooks over upon demand. *Id.* As discussed by the Ninth Circuit in its analysis of the probable cause issue and in the qualified immunity discussion, there was no probable cause to arrest the Gashos under 18 U.S.C. §§ 2232 or 2233, the statutes cited by Petitioners for the arrests. *Id.* at 1427-1432 (Petitioners' Brief at pp. 7a-18a).

18 U.S.C. § 2233 prohibits forcible rescue of property which has been seized. The Ninth Circuit recognized that ample case law as well as the language of the statute itself made clear that the offense required: (1) knowledge that the property was seized; (2) knowledge that removal was unlawful; (3) forcible and willful removal of the property from the dominion and control of the government; and (4) specific intent to frustrate the seizure. 18 U.S.C. § 2232 prohibits physical interference with a search. It is concerned with the destruction or removal of property before it is seized and requires a specific intent to prevent a seizure.

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[9] Petitioners' attempt to discredit the Ninth Circuit by reference to this Court's reversal of the Ninth Circuit in *Hunter v. Bryant*, 502 U.S. 224 (1991), is unwarranted. The Ninth Circuit in the case at bar followed the *Hunter* decision and used the identical test set forth in *Anderson* and quoted in *Hunter*.

Sharon Gasho was given permission to enter the plane and remove her belongings, the logbooks were in no way secured by Customs, the Gashos were not advised that the logbooks were seized, and the agents did not attempt to prevent Sharon Gasho from moving the logbooks from the airplane to her attorney's car even though they were aware she did so. Based on these undisputed facts, the Ninth Circuit found that there were no grounds to support a belief that the Gashos had the specific intent required by the statutes. 39 F.3d. at 1439 (Petitioners' Brief at p. 32a). Alternatively, if the Gashos were arrested for their refusal to return the logbooks upon demand, a reasonable officer would have known their conduct was privileged and could not serve as a basis for finding intent.[10]

The Ninth Circuit held that the passive refusal to hand over property cannot be grounds for inferring criminal intent because the Fourth Amendment gives citizens the right to refuse to consent to warrantless searches and seizures. *Id.* at 1427-1432 (Petitioners' Brief at pp. 7a-18a). Later, in discussing this same issue in the context of qualified immunity, the court pointed out that this proposition is a matter of clearly established constitutional law. *Id.* at 1438-1439 (Petitioners' Brief at pp. 31a-32a). "It is clearly established that a person's Fourth Amendment rights are violated if the sole basis for his arrest is his challenge to the officer's authority absent a warrant." *Id.* at 1439 (Petitioners' Brief at p. 32a).

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[10] The Gashos' refusal was based upon the advice of their attorney at the time.

Petitioners' argument that the Ninth Circuit applied only general and irrelevant principles of constitutional law is frivolous. The Ninth circuit applied the analysis established by this Court. The constitutional right to passively refuse consent to a warrantless search is obviously neither general nor irrelevant.

II. THE PETITION FOR WRIT OF CERTIORARI WAS FILED SOLEY TO DELAY PROCEEDINGS LONG ENOUGH TO BAR THE *BIVENS* CLAIMS.

Petitioners filed their Petition for Writ of Certiorari not because they believed that this matter was worthy of review by this Honorable Court, or with even a remote expectation that it would be granted. Rather, the Petition for Writ of Certiorari was one step in a clever but unsuccesful plan by Petitioners to delay proceedings on remand to the district court until judgment was entered in the FTCA action so they could then invoke the judgment bar of 28 U.S.C. § 2676.

A major issue in the appeal to the Ninth Circuit was the application of 28 U.S.C. § 2676. In its opinion, the Ninth Circuit determined that if a judgment was entered in the FTCA action, whether in favor of or against the United States on the FTCA claims, § 2676 would act as a complete bar to the Gashos' *Bivens* claims. 39 F.3d at 1437-1438 (Petitioners' Brief at pp. 27a-30a). The Ninth Circuit ruled that, "because we have reversed the district court's summary judgment on the FTCA claim involving the arrest, a prior 'judgment' no longer bars the subsequent *Bivens* claim on the arrest. Thus, the Gashos are permitted to pursue either the *Bivens* claim or FTCA claim, or both claims. If they pursue

both remedies in separate actions, they may secure judgments on both claims only if the *Bivens* judgment is entered first." 39 F.3d at 1438.

Following remand, the Gashos elected to pursue both the FTCA and *Bivens* claims and sought and obtained an order of the district court consolidating the *Bivens* and FTCA claims for discovery and a contemporaneous trial. The district court's decision to consolidate the actions prevents the Petitioners from intentionally delaying trial of the *Bivens* action until after trial and judgment in the FTCA action. Unable to do so in the district court, Petitioners attempted to delay the *Bivens* action in the appellate courts.[11]

A stay of proceedings pending petition for writ of certiorari is normally requested before the mandate issues. Had Petitioners, however, sought a stay of the action before January 11, 1995 (the date the mandate was issued), they would have had only until February of 1995 to petition for writ of certiorari.[12]

A Petition for Writ of Certiorari filed in February would likely have been decided before the end of this court's October 1994 term in June. The district court has indicated that at the June scheduling conference it will set both actions for trial. Thus, if Petitioners had timely requested a stay of the *Bivens* claims, there probably would not have been a long

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[11] The United States has not joined in this Petition and the agents request review of only the *Bivens* claim.

[12] Federal Rule of Appellate Procedure 41(b) provides that a stay is only in effect for 30 days unless the petition for writ of certiorari is filed.

enough delay for the FTCA action to result in a judgment in the interim. Instead, Petitioners did not request a stay before the mandate was issued but rather waited four months after the mandate was filed to request a recall of the mandate and a stay. The Petitioners then sought a 60-day extension of time for filing the Petition, which, if granted, would have resulted in the Petition being filed on May 26, 1995, and the responsive brief being due at the end of June, guaranteeing that the Petition would not have been decided until the October 1995 term, after the trial on the FTCA action.[13]

It did not matter to Petitioners' plan that the Petition would be denied. Had the Ninth Circuit granted a stay, the Petitioners would have succeeded in barring the *Bivens* claim even though the Petition was denied. The only way the Petitioners could request a stay from the Ninth Circuit was to file a Petition for Writ of Certiorari, which they did without regard to the merits of the Petition.

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[13]Petitioners were unsuccessful. First, this court only granted a 30-day extension for filing the Petition, and on May 15, 1995, after their Petition was filed, the Ninth Circuit denied their request to recall the mandate and stay the *Bivens* portion of the action pending a decision from this court.

CONCLUSION

There was no error in the Court of Appeals' decision and further review by this Court is not warranted. Respondents respectfully request that the Court deny the Petition for Writ of Certiorari and award Respondents just damages and double costs pursuant to Rule 42.2, Rules of the Supreme Court of the United States, for responding to the Petition.

Respectfully submitted,

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